

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs January 13, 2009

JIMMY DALE PICKETT v. STATE OF TENNESSEE

Appeal from the Circuit Court for Franklin County
No. 15548 Thomas W. Graham, Judge

No. M2008-00990-CCA-R3-PC - Filed March 17, 2009

The Petitioner, Jimmy Dale Pickett, appeals the Franklin County Circuit Court's denial of his petition for post-conviction relief. In 2005, the Petitioner was convicted by a jury of first degree premeditated murder and especially aggravated robbery and, thereafter, sentenced to life imprisonment and twenty years, respectively. On appeal, the Petitioner argues that he was denied the effective assistance of counsel at trial. He submits that trial counsel failed to object to a violation of the rule of sequestration, failed to move to suppress the initial warrantless search of the victim's trailer, and failed to obtain expert testimony in support of the defense theory and to suppress a confession. Following our review of the record and the parties' briefs, we conclude that the Petitioner has not shown that he is entitled to relief. The judgment of the post-conviction court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

David L. Stewart, Winchester, Tennessee, for the appellant, Jimmy Dale Pickett.

Robert E. Cooper, Jr., Attorney General and Reporter; David H. Findley, Assistant Attorney General; J. Michael Taylor, District Attorney General; and Steven M. Blount, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

Following a jury trial, the Petitioner was convicted of first degree premeditated murder and especially aggravated robbery. The trial court sentenced him to concurrent terms of life and twenty years, respectively. On direct appeal, this Court summarized the facts established at trial as follows:

[O]n Tuesday, October 14, 2003, Beverly Searles telephoned the Franklin County Sheriff's Department and reported that her brother, John Harlan Moore, had not reported to work that day and was missing. The next evening, Officer Dustin Foster went to the Pickett farmhouse on Old Salem-Lexie Road and spoke with the [Petitioner]. He asked the [Petitioner] about Moore, and the [Petitioner] gave Officer Foster directions to Moore's trailer. The [Petitioner] seemed nervous, and Officer Foster noticed a small yellow Toyota pickup truck parked at the farmhouse.

Officer Foster and another officer drove to Moore's trailer. When they got out of the car, they immediately smelled a decaying body. Officer Foster telephoned Investigator Mike Bell, who told the officers to go into the trailer. The officers pried open the door, went into the trailer's rear bedroom, and found Moore dead in his bed. They immediately left the trailer, secured the scene, and telephoned Investigator Bell.

When Investigator Bell arrived at the scene, he put on a respirator and went into the victim's bedroom. Blood splatter was on the bedroom walls, but a clean sheet covered the victim. Investigator Bell requested help from the Tennessee Bureau of Investigation (TBI) and spoke with Jean Grant, the victim's neighbor. Grant told Investigator Bell that she last saw the victim alive on the Saturday or Sunday morning before officers found his body and that she saw the victim come out of his trailer and walk past her house. The [Petitioner] drove by, blew the horn, and the victim got into the [Petitioner's] car. The two men then drove back to the victim's trailer. Grant often saw the [Petitioner] coming and going from the trailer but did not know if he lived there with the victim. After speaking with Grant and some of the victim's other neighbors, Investigator Bell decided that he needed to speak with the [Petitioner]. At 3:00 a.m. on October 16, Investigator Bell and several officers left the victim's trailer and went to the Pickett farmhouse. When they arrived, Investigator Bell knocked on the front door, but no one answered. The officers went to the back door and noticed that it was standing open. The [Petitioner] was gone, but a cooler containing ice and beer was in the back of the yellow pickup truck. Officers immediately began searching for the [Petitioner], and surrounding counties sent manpower to help with the search.

On the evening of October 16, a group of officers approached an abandoned tractor trailer rig and found the [Petitioner] hiding in the rig's sleeper berth. They arrested him, and Tullahoma Police Department Detective Earl Morse informed the [Petitioner] of his rights. Franklin County Sheriff's Department Lieutenant Danny Warren put the [Petitioner] into his police vehicle and asked the [Petitioner] if he wanted to tell him what had happened to the victim. The [Petitioner] said yes and told Lieutenant Warren the following: The victim had been stealing money from the [Petitioner]. On Friday, October 10, 2003, the victim stole twenty dollars out of the [Petitioner's] wallet. About 7:00 a.m. the next morning, the [Petitioner] stood in the doorway of the victim's bedroom and shot the victim with a sixteen-gauge shotgun

while the victim was sleeping in bed. After the shooting, the [Petitioner] covered the victim with a sheet and took the victim's wallet out of a pair of pants that were on the bed. The [Petitioner] took one hundred six dollars out of the wallet, drove to the Speedway Market, and bought beer. The [Petitioner] said that he had been planning to kill the victim for at least two weeks.

Lieutenant Warren drove the [Petitioner] to Bean's Creek, where the [Petitioner] showed him the shotgun he had used to kill the victim and three live shotgun shells. The [Petitioner] also told Lieutenant Warren that he had thrown the victim's wallet into a creek in Moore County and that he had consumed antifreeze. Lieutenant Warren drove the [Petitioner] to the emergency room at the Southern Tennessee Medical Center (SMTC). The next day, Lieutenant Warren drove to Moore County and found the victim's wallet. The wallet contained the title to a 1981 Toyota pickup in the name of Jeremy Pickett.

Faye Jernigan, a nurse in the emergency room, testified that the [Petitioner] did not appear to be intoxicated on the night of October 16. The [Petitioner] told her that he drank at least one-half can of antifreeze because he had shot a man with a sixteen-gauge shotgun. The [Petitioner] was treated for ingesting antifreeze and was transferred to Vanderbilt Hospital. Franklin County Sheriff's Department Deputy Ricky Summers testified that he sat with the [Petitioner] while the [Petitioner] was being treated at the SMTC and that the [Petitioner] said, "All this treatment for just killing somebody." Two other officers, who were assigned to guard the [Petitioner] at the SMTC and Vanderbilt, also testified that the [Petitioner] said he killed a man.

After being treated at Vanderbilt, the [Petitioner] was transferred to Harton Hospital in Tullahoma. On October 20, TBI Special Agent Kendall Barham visited the [Petitioner] in his hospital room, advised the [Petitioner] of his Miranda rights, and interviewed him. He took notes during the interview, went to his office and typed out the [Petitioner's] statement, and returned to the hospital. The [Petitioner] read and signed the statement. According to the statement, the [Petitioner] was living with the victim, and the victim was stealing money from him. The [Petitioner] got "fed up [and] pissed off" about the victim's stealing and decided that he "would be doing Harlan a favor by killing him." On Saturday, October 11, 2003, the [Petitioner] woke up early, saw the victim in the [Petitioner's] bedroom, and saw the victim going through the [Petitioner's] billfold. The [Petitioner] did not say anything to the victim and went back to sleep. He woke up again about 5:30 a.m. and walked to the doorway of the victim's bedroom. The victim was asleep, lying on his back, and was facing toward a window but away from the [Petitioner]. The [Petitioner] shot the victim, picked up the empty shotgun shell, and covered the victim with a sheet that had been laying on the floor. The [Petitioner] carried the victim's pants to the living room and took money out of the victim's wallet. He left the house and drove away in the victim's yellow pickup truck. Agent Barham testified that the

police found a pair of pants in the victim's living room and that the [Petitioner] appeared truthful.

Forensic Pathologist Charles Harlan performed the victim's autopsy on October 17, 2003, and testified that the victim died of a shotgun wound to the forehead. The victim's body was significantly decayed, and Dr. Harlan stated that the victim had been dead "about a week, give or take a few days." He stated that fluids collected from the victim were not suitable for toxicology tests due to the body's condition. TBI Special Agent Forensic Scientist Shelly Betts examined a plastic shot sleeve, wadding, and nineteen lead pellets recovered from the victim and concluded that they were consistent with a sixteen-gauge shotgun shell. TBI Special Agent Forensic Scientist Robert E. McFadden testified that he found the [Petitioner's] fingerprint on a glass jar in the victim's kitchen. He also found the [Petitioner's] fingerprint on a beer can and a cigarette pack in the victim's living room.

The [Petitioner's] ex-wife testified for the [Petitioner] that he was meek, did not have a bad temper, and was not violent. Her current husband testified that he had known the [Petitioner] for ten years and had never seen the [Petitioner] angry or violent.

State v. Jimmy Dale Pickett, No. M2005-02434-CCA-R3-CD, 2007 WL 471136, at *1-3 (Tenn. Crim. App., Nashville, Feb. 14, 2007), perm. to appeal denied, (Tenn. May 14, 2007).

On direct appeal of these convictions to this Court, the Petitioner claimed that: (1) he was entitled to a retrial because the State violated the rule of sequestration; (2) the trial court erred by denying his motions to suppress his confessions; (3) the trial court erred by allowing the jury to use a transcript, which had not been introduced into evidence, during deliberations; (4) the trial court erred by refusing to give the jury a corpus delicti instruction; and (5) the State committed prosecutorial misconduct during closing arguments. Id. at *1. After reviewing the record and applicable authorities, this Court affirmed the conviction. Id. at *1, 14. Our supreme court denied the Petitioner's request for permission to appeal on May 14, 2007.

On June 4, 2007, the pro se Petitioner filed a petition for post-conviction relief alleging numerous grounds for post-conviction relief: (1) The State failed to provide the defense with Brady¹ material, which could have proved the Petitioner's innocence; (2) The Petitioner was illegally seized and arrested; (3) The indictment was fatally defective; (4) The trial judge gave constitutionally infirm jury instructions; (5) The trial judge erred in refusing to instruct on lesser-included offenses; (6) Trial counsel failed to adequately investigate the Petitioner's case and discover inconsistent statements of State's witnesses; (7) Trial counsel failed to inform the Petitioner of the strength of the State's case against him; and (8) Trial counsel was ineffective because he "knew that the State's evidence

¹ Brady v. Maryland, 373 U.S. 83 (1963).

against [the P]etitioner was lacking for the charge he was convicted of.” Ultimately, counsel was appointed, and an amended petition was filed.² As grounds for relief, the Petitioner incorporated his prior pro se allegations and further averred that trial counsel was constitutionally ineffective for failing to: (1) object to testimony tainted by a violation of the rule of sequestration, Tennessee Rule of Evidence 615; (2) move to suppress the initial warrantless search of the victim’s trailer; and (3) obtain expert testimony to support the defense theory (someone had shot the victim through the bedroom window) and to show that the Petitioner’s capacity was diminished when he confessed.

A hearing was held in the post-conviction court at which trial counsel and the Petitioner were the only witnesses. Trial counsel testified that he learned several State’s witnesses had out-of-court discussions about whether the window in the victim’s bedroom was open or closed in violation of the rule of sequestration. At the time of this initial line of questioning, trial counsel was trying to imply that someone could have shot the victim through the window.

Trial counsel made an “instant decision” not to object, and he cross-examined these witnesses about their discussions and whether, as Tennessee Bureau of Investigation (TBI) Agents, they were knowledgeable about the rule of sequestration. Trial counsel reasoned, “[M]y theory was the case could not have happened the way [the Petitioner’s] statement to the police said it happened, and credibility was going to be an issue” When asked what remedies are available for a violation of the rule of sequestration, trial counsel responded that the trial judge could have prohibited any testimony from those agents relating their discussions or, as an extreme measure, excluded the Agents’ testimony altogether. The post-conviction court noted, to which trial counsel responded affirmatively, that the trial court additionally could have provided a limiting instruction to the jury as to how to consider coached testimony. Trial counsel further opined that the “big barrier to the defense” was the multiple statements given by the Petitioner to law enforcement officials.

Regarding a statement made by the Petitioner to law enforcement officials, trial counsel acknowledged that the Petitioner had informed him he had consumed a large amount of antifreeze before giving the statement. Trial counsel believed he filed a motion “touching” on the voluntariness of the statements made to Agent Barham. According to trial counsel, after the Petitioner was taken for medical treatment, Agent Barham twice attempted to talk with the Petitioner, but he was unable to do so due to the Petitioner’s level of toxicity from the antifreeze.

Trial counsel admitted that a medical expert would be in the best position to testify regarding the effects of antifreeze upon a person. When asked why he did not seek the testimony of a medical expert regarding the voluntariness of the statement, trial counsel stated that, as he remembered, no law enforcement officials interviewed the Petitioner while Petitioner was intoxicated and that there were no medical records establishing a high level of toxicity. Trial counsel also testified that, even if the Petitioner was inebriated, under Tennessee jurisprudence, the statement may still have been

² We note that the amended petition is not included in the record on appeal and that the issues presented in this petition form the bases for this appeal. However, we are able to discern and verify the necessary information from other documents in the record and will proceed to review the issues as submitted.

voluntarily given and admissible. Trial counsel did not recall any conversation with the Petitioner about whether his consumption of antifreeze affected his ability to give the statement, and he was not alerted to any reason to inquire further.

When asked about his defense theory that the shooting could not have happened the way the Petitioner described, trial counsel relayed that a large amount of pellets should have come from the shotgun used by the Petitioner. However, only a limited number were recovered from the victim's bedroom, and the glass objects in the room had not shattered. Trial counsel also stated that the blood stain on the victim's wall was unusual because it "appeared to be traveling from the end of the bedroom back to the door." Further, blood appeared in a photograph of the back of the victim's door (although the photograph was not entered into evidence), which would have been incredible if the door had been open as the Petitioner described. Trial counsel admitted that he did not seek the services of a ballistics or blood spatter expert.

When asked if he filed a motion to suppress evidence from the initial entry into the victim's trailer, trial counsel responded in the negative. Trial counsel stated that it was his strategy not to connect the Petitioner with the trailer as more than just an occasional visitor. Opining about the initial entry, trial counsel did not believe that the smell of a decaying body created exigent circumstances allowing entrance into the residence; however, he had not researched the issue. Moreover, trial counsel relayed that the officers then exited the residence and got a search warrant before proceeding any further. Trial counsel did not recall the Petitioner claiming he lived in the trailer also and that all of the information suggested it was the victim's trailer alone.

Trial counsel testified that he would have advised the Petitioner of the State's case against him. He felt the "odds" of the Petitioner getting convicted were "pretty good." Trial counsel did not recall any discussions about plea negotiations, and he also did not believe the State was willing to negotiate.

On cross-examination, trial counsel verified that Officer McFadden, leader of the TBI Crime Laboratory response team, was one of the last witnesses to testify for the State. According to trial counsel, Officer McFadden was the first witness to have a distinct memory about the window; Officer McFadden testified that the window was closed and that he kicked the screen out in an attempt to lure outside some of the flies that had accumulated in the bedroom. Trial counsel cross-examined Officer McFadden about whether he photographed the scene before or after he altered it. Trial counsel opined that Officer McFadden's testimony was detrimental to the defense theory of the "mystery shooter at the window."

Regarding the Petitioner's level of toxicity, trial counsel stated that he had no indication that the Petitioner appeared confused when he was interviewed. In fact, the conversation between Lt. Warren and the Petitioner as they drove was very "congenial," and the details provided by the Petitioner "were pretty right on." Trial counsel relayed that he filed detailed motions trying to suppress the Petitioner's statements on other grounds. Trial counsel stated that, had the Petitioner told him that he did not recall giving the statement or was confused due to his consumption of

antifreeze, he would have explored the issue of the voluntariness of the Petitioner's statement further.

Trial counsel opined that a ballistics expert would not have benefitted the Petitioner at trial. He also did not think a blood spatter expert would have helped. More importantly, as a matter of "physics," trial counsel tried to establish that the victim's body "could not have moved after being struck, [and] then with the length of that barrel and trying to stand down in such a position with that shotgun tilted in such a way as to get the shot," making the Petitioner's account of events implausible. If he had been able to do so, whether the window was up or down would have "become a moot point"

The Petitioner testified. He first stated that he informed trial counsel that he had consumed antifreeze and that this had an effect on him during the interview: "[I]t'd put you out of this world." The Petitioner testified that he informed Lt. Warren he needed to go to the hospital because he had consumed antifreeze and that he informed trial counsel of this fact. He also claimed that he fainted right before officers apprehended him and that the officers had to hold him up at times. The Petitioner stated that officers were pointing guns at him while he was giving a statement but later admitted that Lt. Warren was not brandishing a weapon while they drove and the two conversed. Finally, the Petitioner asserted that he told trial counsel he resided with the victim in the trailer.

After hearing the evidence presented, the post-conviction court denied relief by written order filed April 4, 2008. The post-conviction court concluded that trial counsel was more credible than the Petitioner and that the Petitioner failed to prove his allegations by clear and convincing evidence. This timely appeal followed.

Analysis

On appeal, the Petitioner argues that counsel failed to provide the effective assistance of counsel guaranteed him by the United States and Tennessee constitutions at trial. First, he submits that trial counsel should have objected to testimony tainted by a violation of the rule of sequestration. Second, he contends that trial counsel should have moved to suppress the evidence obtained as a result of the warrantless entry into the victim's trailer. Finally, the Petitioner submits that trial counsel was ineffective for failing to present expert testimony in support of his defense theory and to show diminished capacity.

To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not reweigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The post-conviction judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive

on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to “reasonably effective” assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer’s assistance to his or her client is ineffective if the lawyer’s conduct “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant’s lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant’s failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

In evaluating a lawyer’s performance, the reviewing court uses an objective standard of “reasonableness.” Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel’s choices “and should indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel’s tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel’s alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court’s determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court’s findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. “However, a trial court’s conclusions of law—such as whether counsel’s performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court’s conclusions.” Id. (emphasis in original).

I. Rule of sequestration

The Petitioner submits trial counsel failed to ensure that the State complied with Tennessee Rule of Evidence 615 at trial and that, as a result, the State’s witnesses had the opportunity to discuss

their testimony during trial. Rule 615 provides that “[a]t the request of a party the court shall order witnesses, including rebuttal witnesses, excluded at trial or other adjudicatory hearing.” Tenn. R. Evid. 615. Furthermore, “[t]he court shall order all persons not to disclose by any means to excluded witnesses any live trial testimony or exhibits created in the courtroom by a witness.” Id. The purpose of the sequestration rule is to prevent witnesses from hearing the testimony of other witnesses and subsequently adjusting their testimony. State v. Harris, 839 S.W.2d 54, 68 (Tenn. 1992).

On direct appeal, the Petitioner argued that he was “entitled to a new trial because some of the State’s witnesses ‘blatantly, unashamedly, and haughtily’ violated Tennessee Rule of Evidence 615, the rule of sequestration.” Pickett, 2007 WL 471136, at *3. This Court detailed the following facts relevant to the issue:

Investigator Bell testified for the State on the second day of trial. On cross-examination, defense counsel asked Bell if he remembered meeting with some people, including the prosecutors and Agent Barham, after trial adjourned the previous day. Investigator Bell answered, “Possibly,” and counsel then asked him, “Were discussions held at that moment about how the testimony had developed during the day?” Investigator Bell again answered, “Possibly” and said, “I don’t remember.” He then acknowledged the meeting occurred but said he did not remember exactly what was said during the meeting. Agents Betts and McFadden testified for the State on the third day of trial. On cross-examination, Agent Betts testified that the previous day, she heard Agent Barham ask Agent McFadden about whether the window in the victim’s bedroom had been open or closed during the TBI’s investigation. Agent McFadden acknowledged on cross-examination that the previous day, Agent Barham brought “the question of the half opened window” to his attention. He said that Agent Barham had not yet testified when Barham talked with him about the window.

Id.

Following this account of the facts, this Court went on to conclude that the Petitioner had waived the issue because trial counsel failed to object at trial, reasoning as follows:

The [Petitioner] claims that Investigator Bell discussed the evidence with the prosecutors after the first day of trial and then “carried the information” to Agents Betts and McFadden. He contends that his accusations are “abundantly supported by the testimony of the violators.” In a separate, but related issue, the [Petitioner] also claims that he was denied due process by “[c]areless utterances, made in the presence of a sequestered witness who then pursued it with two other State’s witnesses”; that the State’s failure to disclose the after-hours meeting violates Brady v. Maryland, 373 U.S. 83 (1963); and that Agents Barham, Betts, and McFadden “could have been prohibited from testifying as a sanction for this improper contact.”

Our review of the record reflects that before the first State witness testified, the Rule was invoked. The defense briefly questioned Investigator Bell during cross-examination about whether a meeting occurred after the first day of trial and whether the participants discussed the evidence. The defense also briefly questioned Agents Betts and McFadden about whether they had discussed evidence. However, the [Petitioner] never alleged at trial that the witnesses violated the Rule, never objected to any of the witnesses' testimony, and never requested a jury-out hearing to determine the facts of the violation or prejudice to the [Petitioner].

Id. at *4.

The Petitioner takes issue with trial counsel's failure to object.

There is no indication that, if trial counsel had objected, the trial court would have excluded the testimony of Agents Betts and McFadden. A trial court may impose a variety of sanctions for a Rule 615 violation according to the circumstances. State v. Anthony, 836 S.W.2d 600, 605 (Tenn. Crim. App. 1992). The decision to exclude or permit the testimony is a matter within the trial court's discretion, subject to a showing of abuse of that discretion and prejudice to the complaining party. State v. Black, 75 S.W.3d 422, 424-25 (Tenn. Crim. App. 2001).

The post-conviction court concluded that the Petitioner was not denied the effective assistance of counsel in this regard, ruling as follows:

The [c]ourt finds that the trial counsel did address an alleged "rule" violation during the trial and attempted to use the issue to attack the credibility of witnesses. The [c]ourt acknowledges that the Court of Appeals noted that the defense counsel never formally alleged at [trial] that witnesses violated the "rule" and never objected to any witnesses' testimony, and therefore waived the issue. But, the [c]ourt also notes that the Court of Appeals thoroughly reviewed the issue and found no plain error. The [c]ourt finds that there was never a showing of an actual violation of the "rule," and the [c]ourt found no "rule" violation that would have precluded witnesses, proof or testimony. The [Petitioner's] trial counsel ultimately chose the strategy to use the "rule" issue as means to discredit certain state witnesses.

The record supports the post-conviction court's findings. Trial counsel testified that, upon learning of the potential violation of the rule of sequestration, he made a tactical decision not to object and, furthermore, that it did not appear to him that any witnesses had changed their testimony based upon out-of-court conversations. Trial counsel attacked the witnesses' credibility on cross-examination asking whether they had discussed the case. Moreover, Officer McFadden clearly testified that the window was closed and that he kicked the screen out in an attempt to clear the room of flies, and trial counsel cross-examined Officer McFadden about whether he photographed the scene before or after he altered it. Finally, on direct appeal, notwithstanding the Petitioner's waiver of the issue, this Court noted that "given the overwhelming evidence of the [Petitioner's] guilt, we

discern no plain error.” Pickett, 2007 WL 471136, at *4. The Petitioner has failed to establish that trial counsel’s failure to object was deficient performance or resulted in prejudice. See, e.g., Patrick D. Paris v. State, No. E2003-01930-CCA-R3-PC, 2004 WL 1056517, at *5-6 (Tenn. Crim. App., Knoxville, May 11, 2004).

II. Initial search

Next, the Petitioner argues that trial counsel was ineffective for failing to seek suppression of the initial search into the trailer on grounds that the Petitioner also lived in the trailer and did not consent to the search. He further contends that the smell of a decaying body did not create exigent circumstances sufficient for a warrantless entry of the residence.

The post-conviction court concluded that “the trial strategy of the defense was to negate a ‘connection to the victim’ and that they decided not to attack the officers’ entrance into the victim’s house.” Continuing, the post-conviction determined “that this was an appropriate trial strategy given the volume of proof against the [Petitioner].” We agree.

At the post-conviction hearing, trial counsel testified that he did not recall the Petitioner stating that he resided in the trailer and that all of the information suggested it was the victim’s trailer alone. In fact, as a matter of trial strategy, trial counsel tried not to connect the Petitioner with the trailer other than as an occasional visitor. At the suppression hearing, trial counsel cross-examined Investigator Bell, who “stated that he did not find anything with the [Petitioner’s] name on it in the trailer and that he did not see anything in the trailer to connect the [Petitioner] to it.” Pickett, 2007 WL 471136, at *8. Moreover, after viewing the decaying body, the officers then exited the residence and got a search warrant before collecting any evidence. The evidence would have been inevitably discovered by lawful means. Finally, even if the Petitioner had lived in the trailer, the Petitioner never established that he had a reasonable expectation of privacy in the victim’s bedroom.

The Petitioner has failed to establish deficient performance or demonstrate how he was prejudiced by any alleged deficiency in this regard. The Petitioner is not entitled to relief on this issue.

III. Expert testimony

Lastly, the Petitioner contends that he received ineffective assistance due to trial counsel’s failure to obtain expert witnesses (mental health, ballistics, or blood) for trial. He submits that expert testimony could have “validated two of the [defense’s] primary arguments at trial or could have provided evidence to suppress the Petitioner’s initial confession.”

The post-conviction court also addressed this argument in its written order denying relief:

The defense claims that the [Petitioner’s] trial counsel should have secured the services of an expert to support the claim that someone must have shot the victim from the bedroom window. The [c]ourt finds that the defense attorney adequately presented and adequately argued this issue at trial. The defense presented no proof that an expert could be obtained to support a claim that the victim was shot from the

window. The [c]ourt notes that the [Petitioner] gave multiple confessions of shooting the victim. The [c]ourt also notes that the lead TBI agent over the crime scene response team testified that he opened the subject window from the inside to let the flies out of the victim's bedroom. The [c]ourt finds that trial counsel's failure to call an expert on this issue does not reach the level of ineffective assistance of counsel. This claim is without merit. The defense also claims that the trial counsel should have secured the services of a medical doctor/expert who could have reviewed the medical records and offered an opinion that the [Petitioner] was incapable of knowingly and voluntarily waiving his rights against self-incrimination or that the [Petitioner's] confession was, in fact, unreliable. The [c]ourt notes that the defense presented no proof that such an expert exists. The [c]ourt finds that the evidence at trial was clear that the [Petitioner] appeared fine when the police seized him and that he spent several hours with the police, giving statements to the police and driving with them to different locations retrieving physical evidence. The [c]ourt finds that the proof showed that the [Petitioner] did not show signs of confusion and appeared to understand everything he was talking about. The [c]ourt finds that the proof at trial showed that, after he ultimately received medical care, he again gave confessions to the police and to medical personnel that these subsequent confessions were consistent with his [previous] confessions. The [c]ourt finds that trial counsel had no real basis to secure an expert witness in the field of medicine

Again, the record does not preponderate against these findings. The Petitioner did not present any proof to substantiate that, had trial counsel acquired expert assistance in ballistics and blood spatter, this testimony would have supported the defense theory that the victim was shot from angle inconsistent with the Petitioner's confessions. Nor did the Petitioner present proof that he would have had a legitimate basis for suppression of his statements based upon his consumption of antifreeze. We cannot speculate as to what evidence further investigation would have yielded. See Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1999).

Officer McFadden distinctly remembered opening the window and kicking out the screen to clear the room of flies that had gathered around the decaying body. Furthermore, trial counsel testified that he never had any indication that the Petitioner's statement was affected by his ingestion of antifreeze, and trial counsel made numerous motions to suppress the Petitioner's confessions, including that the Petitioner did not knowingly, intelligently, and voluntarily waive his Miranda³ rights. See Pickett, 2007 WL 471136, at *4-8. We conclude that counsel was not ineffective in failing to develop further expert testimony.

Conclusion

Based upon the foregoing reasoning and authorities, we conclude that the Petitioner has failed to show ineffective assistance of counsel at trial. The Franklin County Circuit Court's denial of post-conviction relief is affirmed.

³ Miranda v. Arizona, 384 U.S. 436, 444 (1966)

DAVID H. WELLES, JUDGE